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'That Belongs in a Museum!' Rubin v. Iran: Implications for the Persian Collection of the Oriental Institute of the University of Chicago

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*“That Belongs in a Museum!”*¹ *Rubin v. Iran: Implications for the Persian Collection of the Oriental Institute of the University of Chicago*

I. INTRODUCTION

Imagine a situation in which a priceless document from the founding of the United States was loaned to a foreign museum for analysis. Furthermore, imagine that at the same time this document traveled abroad, the U.S. government owed money to citizens of that foreign state. As a result, these foreigners, to whom money was owed, decided to file a lawsuit in their country arguing that the document should be put up for auction so that the proceeds from the sale could pay off the U.S. government’s debt. After the sale, the document could end up in a museum or in a private collection anywhere in the world, removed from public view and without assured continuation of access by historians and scholars.

While, at first glance, the aforementioned situation appears to be unbelievable, many of its components are analogous to a case that is currently on the docket of the United States District Court for the Northern District of Illinois. This case, *Rubin v. Islamic Republic of Iran*,² calls for the auction sale of ancient Persian artifacts that are considered by scholars to be “[o]ne of the best sources of information we have about the Persian Empire.”³ The artifacts are tablets on which government records of the Persian

1. *Indiana Jones and the Last Crusade* (Paramount Pictures 1989).

2. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110 (N.D. Ill. 2004) [hereinafter *Rubin I*]; *Rubin v. Islamic Republic of Iran*, 408 F. Supp. 2d 549, 551 (N.D. Ill. 2005) [hereinafter *Rubin II*]; *Rubin v. Islamic Republic of Iran*, No. 03-C9370, 2007 WL 1169701, at *2 (N.D. Ill. Apr. 17, 2007) [hereinafter *Rubin IV*]; *Rubin v. Islamic Republic of Iran*, No. 03-C9370, 2008 WL 192321, at *2 (N.D. Ill. Jan. 18, 2008) [hereinafter *Rubin V*].

3. Amy Braverman Puma, *Worth Millions . . . or Priceless?*, U. CHI. MAG., Oct. 2006, at 16, 18.

King Darius I were written.⁴ Scholars argue that the tablets “resonate for Iranians at a very profound level”⁵ because they are actual accounts of the Persian Empire written by the Persians themselves. Moreover, as the cultural heritage of the people of Iran, the tablets are “as important as the crown jewels of England, or the original document of the Magna Carta, or the Western Wall in Jerusalem, or the Parthenon in Athens.”⁶ Why would such important pieces of history be put up for auction?

The plaintiffs in *Rubin* argue that because the artifacts in question are Persian and belong to Iran, they should be sold in order to compensate victims of Iran-financed terrorism.⁷ The artifacts were excavated in Iran by the Oriental Institute of the University of Chicago in the 1930s, and have been on scholarly loan at the Institute ever since.⁸ In examining this case, the question arises whether cultural property owned by a sovereign, in this case Iran, may be used to satisfy a legal judgment against that sovereign.

The purpose of this note is to argue that cultural property should be immune from plaintiffs’ rights to recovery and that it is legally and morally unjust for such property to be used to satisfy a legal judgment against a sovereign. In order to support this argument, this note will examine U.S. federal legislation, including the Foreign Sovereign Immunities Act (FSIA),⁹ as well as international conventions of the United Nations Educational, Scientific and Cultural Organization (UNESCO), which specifically call for international cooperation to protect cultural property.¹⁰ In addition, this note will demonstrate that since bills have been introduced in the U.S. Congress as alternatives to lawsuits under the terrorist state exception of the FSIA, a blanket immunity of cultural property does not leave plaintiffs without

4. Matthew W. Stolper, *The Persepolis Fortification Tablets*, ORIENTAL INST. NEWS & NOTES, Jan. 2007, at 6.

5. Gil J. Stein, *A Heritage Threatened: The Persepolis Tablets Lawsuit and the Oriental Institute*, ORIENTAL INST. NEWS & NOTES, Jan. 2007, at 3-4.

6. *Id.*

7. *Rubin I*, 349 F. Supp. 2d at 1110.

8. Stein, *supra* note 5, at 3-4.

9. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (2000).

10. E.g., Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 4 U.N.T.S. 275 [hereinafter, UNESCO Constitution]; Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

remedy.¹¹ Finally, this note will argue that changes in U.S. legislation are necessary in order to prevent future lawsuits calling for cultural property to satisfy legal judgments.

II. *RUBIN V. IRAN*

A. *Background*

The *Rubin* case stems from the September 1997 suicide bombing at a pedestrian mall on Ben Yehuda Street in Jerusalem, which killed five bystanders and left 192 people injured.¹² Hamas claimed responsibility for the bombing and the Islamic Republic of Iran was found to be its financial backer.¹³ On July 31, 2001, American survivors filed a civil suit in the United States District Court for the District of Columbia against the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and high-ranking Iranian government officials.¹⁴ Jurisdiction for the case was based on a FSIA provision that provides an exception to sovereign immunity for acts of "extrajudicial killing."¹⁵ The defendants were found at fault because they were active financiers of Hamas and the bombing would not have occurred without their financial support.¹⁶ When the defendants did not appear in court, the court entered a default judgment in favor of the plaintiffs. They were awarded \$423.5 million in damages,¹⁷ including \$300 million in punitive damages.¹⁸

B. *Collecting on the Award*

David J. Strachman, the plaintiffs' attorney, attempted to collect on his clients' award from Iranian assets held in the United

11. See, e.g., Press Release, United States Senator Arlen Specter, Lautenberg/Specter Bill to Provide Justice for Victims of State-Sponsored Signed into Law (Jan. 29, 2008), http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=c67d30d9-c790-514e-f446-d7f7d0e861df&Region_id=&Issue_id= [hereinafter Lautenberg/Specter Bill].

12. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261 (D.D.C. 2003).

13. *Id.* at 262.

14. James Wawrzyniak, *Rubin v. The Islamic Public of Iran: A Struggle for Control of Persian Antiquities in America*, HARV. L. SCH. STUDENT SCHOLARSHIP SERIES, Paper 17, at 2 (June 21, 2007), available at <http://lsr.nellco.org/harvard/students/papers/17/>.

15. *Campuzano*, 281 F. Supp. 2d at 269.

16. *Id.* at 262.

17. *Id.* at 274-79.

18. Alicia Hilton, *The Persepolis Tablets: Terror Victims Target Ancient Persian Artifacts*, THE AM. BAR ASS'N: SECTION OF LITIG., Apr. 2007 (on file with law review).

States. Because Iran is designated by the U.S. State Department as a supporter of terrorism, however, Iranian assets in the United States are blocked or frozen for attachment.¹⁹ Nevertheless, Strachman tried to extract funds from bank accounts belonging to the Consulate General of Iran.²⁰ This method did not work because the funds already had a lien upon them by an earlier judgment creditor.²¹ In addition, attempts to seize Iranian-controlled bank accounts held by the Bank of New York proved fruitless; and the sale of an Iranian residence located in Lubbock, Texas, yielded a mere \$390,000.²²

The Oriental Institute of the University of Chicago received significant media coverage in April 2004 when it returned three hundred ancient Persian tablets to officials of the Iranian Cultural Heritage Organization, Iran's national antiquities department.²³ Following the much-publicized story of the artifacts' return to Iran, the first return of archaeological artifacts on loan from Iran since 1979,²⁴ Strachman and his team adopted the novel approach of executing the judgment upon Persian antiquities in museum collections throughout the United States.²⁵ They argued before the United States District Court for the Northern District of Illinois that museums, like the Oriental Institute of the University of Chicago, held antiquities which could be attached by the plaintiffs as judgment creditors of Iran.²⁶ These priceless collections would then be sold at auction to the highest bidder to raise money to pay the plaintiffs' judgment award.²⁷

19. Jennifer Elsea, *Lawsuits Against State Supporters of Terrorism: An Overview*, THE LIBRARY OF CONGRESS: CRS REPORT, CRS-1 (June 23, 2005) [hereinafter Elsea, *Lawsuits Against State Supporters*].

20. Wawrzyniak, *supra* note 14, at 6.

21. *Id.*

22. *Id.* at 6-7.

23. Press Release, University of Chicago, University of Chicago Returns Ancient Persian Tablets Loaned by Iran, (Apr. 28, 2004), available at <http://www-news.uchicago.edu/releases/04/040428.tablets.shtml>.

24. *Id.* See Wawrzyniak, *supra* note 14, at 9.

25. Ron Grossman, *Persian Treasure Trove on the Line at U. of C.: Suit Over Terrorism Could Force Their Sale*, CHI. TRIB., June 28, 2006, at 7.

26. Wawrzyniak, *supra* note 14, at 7.

27. *Id.*

C. How the PFA Differs from Other Museum Collections at Issue in the Lawsuit

Unlike the Persian collections of the Field Museum of Natural History, Harvard University art museums, and Boston's Museum of Fine Arts, which are also at issue in the lawsuit, the Persepolis Fortification Archive (PFA) of the Oriental Institute was not purchased. As previously described, the PFA was scientifically excavated by Oriental Institute archaeologists under the leadership of Ernst Herzfeld.²⁸ It arrived at the Oriental Institute in Chicago in 1936, on loan from the Iranian government for the purposes of translation and analysis,²⁹ the details of which will be described later in this work. The tens of thousands of 2,500-year-old clay tablets discovered during these excavations are in fragile physical condition and are written mainly in Elamite cuneiform alphabet, the oldest written language of Iran.³⁰ It is thought that only twenty or so researchers in the world can read this language and many of them are on residency at the Oriental Institute.³¹ At present, two-thirds of the collection has been returned to Iran, while eight thousand tablets and eleven thousand poorly preserved fragments remain at the Oriental Institute for study.³²

The Oriental Institute argued that the artifacts in question were immune from attachment under the FSIA provisions concerning the enforcement of judgments against foreign sovereigns.³³ Iran entered the case after the Court ruled in plaintiffs' favor, stating that the Oriental Institute "[is] not entitled to assert immunity on Iran's behalf."³⁴ Iran maintained that the artifacts in question were immune from execution under the FSIA.³⁵ The plaintiffs argued against Iran's assertion and were awarded another victory in March 2007 by Magistrate Judge Ashman.³⁶ Judge Ashman's decision allowed the plaintiffs more

28. Daniel Parisi, *Of Ancient Empires and Modern Litigation: A Lawsuit Jeopardizes the Persepolis Fortification Archive at the Oriental Institute*, TABLEAU, Winter 2008, at 11, 12.

29. Stein, *supra* note 5, at 4.

30. *Id.* at 3-4.

31. *Id.* at 4.

32. *Id.*

33. *Rubin II*, 408 F. Supp. 2d at 554.

34. *Rubin v. Iran*, 436 F. Supp. 2d 938, 946 (D. Ill. 2006).

35. *Rubin IV*, 2007 WL 1169701 at *2.

36. *Id.* at *14.

time to complete their discovery in support of their claim that the artifacts in question were subject to the "commercial use" exception of the FSIA.³⁷ Additionally, the decision allowed the plaintiffs further discovery into the Chogha Mish Collection of the Oriental Institute, which the plaintiffs also sought to attach.³⁸ In response, Iran filed a "Motion for Clarification on Rulings Regarding Plaintiffs' Motion to Compel, or in the Alternative, Motion for Protective Order."³⁹ The U.S. Department of Justice (Justice Department) filed a "Statement of Interest" in support of the Oriental Institute and Iran.⁴⁰ However, in his January 2008 decision, Judge Ashman denied both of Iran's motions and allowed the plaintiffs' general discovery of Iran's assets in the United States.⁴¹

III. PERSIAN FORTIFICATION ARCHIVE

A. *The Oriental Institute's Excavations*

Founded in 1919, the Oriental Institute of the University of Chicago is a research institution and a museum that focuses on the study of the ancient Near East.⁴² It has sponsored excavations and survey projects in every country in the region, the results of which "have defined the basic chronologies for many ancient Near Eastern civilizations and have helped determine the time when mankind made the transition from hunter-gatherer to settled community life."⁴³ Moreover, archaeologists at the Oriental Institute have been at the forefront of developing new methods for excavation, including the use of interdisciplinary teams as well as aerial surveys to map archaeological sites.⁴⁴

In 1931, with the financial support of an anonymous benefactress,⁴⁵ Oriental Institute archaeologists began excavations

37. *Id.* at *11.

38. *Id.* at *6.

39. *Rubin V*, 2008 WL 192321 at *1.

40. *Id.*

41. *Id.* at *20.

42. The Oriental Institute of the University of Chicago A Brief History, <http://oi.uchicago.edu/research/history> (last visited Mar. 29, 2008).

43. *Id.*

44. *Id.*

45. *Id.*

45. The Oriental Institute of the University of Chicago The Persian Expedition, <http://oi.uchicago.edu/research/projects/per/> (last visited Mar. 29, 2008).

at the *Takht-i-Jamshid* (Farsi for “Persepolis”⁴⁶) site in southwestern Iran.⁴⁷ The construction of this imperial residence complex, known as Persepolis, began during the reign of Darius I (522 to 486 B.C.E) and continued under his son, Xerxes (486 to 465 B.C.E.) and subsequent Achaemenid rulers.⁴⁸ Persepolis was conquered in 330 B.C.E. by Alexander the Great and his invading armies, and remained unexcavated until 1931.⁴⁹ In 1933, construction of a truck ramp to the terrace of Persepolis led to the discovery of clay tablets in a fortification wall surrounding the complex.⁵⁰ After excavations by the Oriental Institute, the 30,000 tablets which were unearthed were appropriately named the Persepolis Fortification Archive (PFA).⁵¹

Today, there are laws regulating the export of artifacts from their countries of origin. When Oriental Institute archaeologists conducted the excavations at Persepolis in the first half of the 20th century, the system of *partage* was still in place. James Cuno, director of the Art Institute of Chicago, described *partage* as the following:

Foreign archaeologists excavated—scientifically—and shared the finds with the local authorities and the host institutions. The archaeological museums of the great universities of the world—in the U.S. that would be the University of Chicago, Pennsylvania, Yale and Harvard—all were built through this system of *partage*. As were the local museums in Baghdad, Kabul and Cairo. Objects were excavated, preserved and shared.⁵²

After an excavation, artifacts were divided into two piles. The source nation, or the country in which the excavation was held, chose one pile, and the other pile returned with the archaeological team to its sponsoring institution.⁵³ Because archaeologists “depend on the goodwill of source nations to conduct their digs,”⁵⁴

46. Stolper, *supra* note 4, at 6.

47. *Id.*

48. *Id.*

49. *Id.*

50. Parisi, *supra* note 28, at 12.

51. *Id.* at 11-12.

52. Richard Lacayo, *A Talk with James Cuno*, TIME, Jan. 27 2008, available at <http://lookingaround.blogs.time.com/2008/01/27/> (last visited Apr. 11, 2008).

53. Richard Lacayo, *Who Owns History?*, TIME, Feb. 21 2008, available at <http://www.time.com/time/magazine/article/0,9171,1715290,00.html> (last visited Apr. 10, 2008).

54. *Id.*

partage appeared to be fair given the dearth of laws regarding cultural property in both source nations and nations that sponsored archaeological excavations. It was in the light of *partage* that the Oriental Institute and Iran entered into an agreement that allowed for the entire PFA collection to travel to Chicago to be studied by Oriental Institute researchers and then to be returned to Iran upon completion.

In preliminary analyses of the PFA, Oriental Institute researchers found that the tablets appeared to be administrative records dealing with the daily lives of ordinary people living in the Persian Empire.⁵⁵ There was no mention of the actions of kings or important people, which scholars had presumed they would find.⁵⁶ Some of the tablets had only the impressions of seals and no text at all.⁵⁷ Those tablets with text were mostly written in the little-known Elamite language.⁵⁸ In the 1930s, there were no Elamite texts for scholars to use for comparative study, making it difficult for researchers to understand the collection.⁵⁹ Richard T. Hallock, an Oriental Institute scholar who began a meticulous study of the Elamite tablets after his return from naval service in World War II, published the first work on the texts in 1969.⁶⁰ Hallock's publication was fundamental because it detailed over 2,000 of the tablets. It listed identifiable seals and impressions, gave the basics of Achaemenid Elamite grammar, and provided a glossary of all other known Achaemenid Elamite texts.⁶¹ Hallock's publication also included translations and transliterations of the texts and provided a thorough account of the transactions and administrative systems documented by the texts.⁶² In 1978, Margaret Root published the first part of her study of the seal impressions on the Elamite tablets based on Hallock's earlier work.⁶³

The careful research of Hallock and Root enabled scholars to make sense of the PFA. In brief, "[t]he PFA was an administrative repository in which the royal clerks and supervisors recorded the

55. Parisi, *supra* note 28, at 12.

56. *Id.*

57. Stolper, *supra* note 4, at 7.

58. *Id.*

59. Parisi, *supra* note 28, at 12.

60. *Id.* at 13.

61. *Id.*

62. Stolper, *supra* note 4, at 7-8.

63. Parisi, *supra* note 25, at 12.

storage and outlay of stocks of food,”⁶⁴ usually to people who were on the government payroll. These people included ordinary workers, skilled craftsmen, administrators and travelers. In terms of their importance to scholarship, the tablets are the only known first-hand accounts of the daily life of the Persian Empire, providing detailed descriptions of the movement of people and goods throughout the Empire and insights into its internal workings.⁶⁵

Professor Matthew Stolper of the Oriental Institute explained that research and publications on the PFA have had four main implications on the understanding of the ancient Iranian past. First, because the Elamite texts have transcriptions of Iranian names and titles, they are a resource for the study of other ancient Iranian languages as well as the vocabulary of production and administration.⁶⁶ Second, thanks to the seal impressions present on some of the tablets, they are able to be securely dated to the narrow time range of Darius I, from 509 to 494 B.C.E.⁶⁷ As a third point, the tablets are “a basis for reinterpreting fragmentary administrative records from other regions of the Achaemenid Empire.”⁶⁸ Finally, the PFA proves that the Achaemenids were not the “illiterate barbarian rulers”⁶⁹ as was previously thought. The texts provide evidence that the Achaemenid rulers “were successors to millennia of statecraft and administrative technique,”⁷⁰ had “meticulously controlled regional institutions,”⁷¹ and “kept close communication with regional systems embedded in other societies of the Empire.”⁷²

B. Why the PFA is Important

As pieces of hand-formed clay with seemingly incomprehensible cuneiform impressions, the individual tablets and fragments of the PFA by themselves are rather unimpressive. Professor Stolper explained that the true significance of the tablets

64. *Id.* at 13.

65. Puma, *supra* note 3, at 18.

66. Stolper, *supra* note 4, at 7-8.

67. *Id.* at 6.

68. *Id.* at 7.

69. *Id.*

70. *Id.*

71. Parisi, *supra* note 28, at 18.

72. *Id.*

lies in the story they tell as a comprehensive unit. In an interview on National Public Radio, Stolper stated:

[W]hen you start putting [the tablets] together, you find out that they're part of an information system that represents an administrative system that gave you a slice of the population around the king that reached from the king himself and his cousins down to the lowest worker in the vicinity of the palace.⁷³

Like Stolper, Professor Gil Stein, Director of the Oriental Institute, also emphasizes the necessity of keeping the PFA together. Stein explains: "Unexpected discoveries are still being made, and the meaning and reliability of every piece depends on its connections with the whole information system of the entire Fortification Archive."⁷⁴

Furthermore, the tablets are extremely important because they provide a unique resource for scholarship and have modern significance as "irreplaceable items of cultural heritage for the people of Iran."⁷⁵ To demonstrate the modern significance of the tablets, Professor Gil Stein emphasizes that "Persepolis and the Persian Empire are the central symbols of Iranian cultural identity."⁷⁶ In addition, because these tablets are the actual records of the Persian King Darius I, scholars argue that they are as important to the cultural heritage of the Iranian people.⁷⁷

IV. U.S. FEDERAL LEGISLATION

A. *History of the FSIA*

A brief review of the history of foreign sovereign immunity in the United States leading up to the passage of the FSIA is necessary for a discussion of FSIA and its "commercial use" exception presented in *Rubin v. Iran*. To begin, the U.S. Supreme Court's decision in *Schooner Exchange v. McFaddon*⁷⁸ demonstrates the classic notion of sovereign immunity. In this case, the Emperor of France seized a vessel owned by two

73. Radio broadcast: Fight Over Ancient Persian Tablets Goes to U.S. Court (July 17, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5562022> (last visited Apr. 22, 2009) [hereinafter Fight Over Ancient Persian Tablets Goes to U.S. Court].

74. Parisi, *supra* note 28, at 18.

75. Stein, *supra* note 5, at 3.

76. *Id.*

77. *Id.* at 4.

78. See generally *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

Americans.⁷⁹ When the vessel sailed into U.S. territory as an armed French military ship, the American plaintiffs claimed to be its rightful owners and sought execution on the vessel.⁸⁰ Using the principles of international customary law, Chief Justice Marshall emphasized the “perfect equality and absolute independence of sovereigns, [a] common interest impelling them to mutual intercourse, and an interchange of good offices with each other.”⁸¹ In stressing the importance for states to maintain friendly relations, Marshall’s opinion re-established that a sovereign could enter upon foreign territory “in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”⁸² Marshall also made a clear distinction between the status of public armed ships in foreign waters and the status of the private property of a sovereign in a foreign land.⁸³ The U.S. Supreme Court’s decision exempted the French military vessel from U.S. jurisdiction, thereby making it immune from judicial proceedings in American courts, and confirmed that foreign state immunity is based upon customary international law.⁸⁴

In 1952, the United States followed an international trend in adopting a more restrictive theory of foreign sovereign immunity.⁸⁵ The U.S. State Department announced its implementation of the restrictive theory in a 1952 letter to the Attorney General from

79. *Id.* at 117.

80. *Id.* at 136.

81. *Id.* at 137.

82. *Id.*

83. *See id.* at 145 (“[T]here is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.”).

84. *Id.* at 147. Customary international law must have both general practice and acceptance as law (*opinio juris*). As a source of international law, custom is explained in Statute of the International Court of Justice art. 38(1)(b): “The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: (b) international custom, as evidence of a general practice accepted as law.” Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031.

85. *See* Letter from Jack B. Tate, Acting Legal Advisor for the U.S. Sec’y of State, to Phillip B. Perlman, Att’y Gen. (May 19, 1952), *available at* http://www.law.berkeley.edu/faculty/ddcaron/Documents/US_Statutes/1952_Tate_%20Letter_Restrictive_Sov_Immunity.doc.

Jack B. Tate, then Acting Legal Advisor for the Secretary of State (Tate Letter).⁸⁶ Tate contended that "[t]he Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases."⁸⁷ He explained:

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) or [sic] a state, but not with respect to private acts (*jure gestionis*).⁸⁸

Tate justified adopting a restrictive theory of sovereign immunity by stating that "the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."⁸⁹ Tate also argued that the absolute theory of sovereign immunity put the United States at a disadvantage in foreign courts because the United States gave immunity to foreign governments but "subject[ed] itself to suit *in* these same courts *in* both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels."⁹⁰

However, the Tate Letter did not offer guidelines for the application of the restrictive theory of foreign sovereign immunity.⁹¹ Consequently, courts had trouble determining whether an action was "sovereign and public" or "private."⁹² Additionally, the Tate Letter raised questions about whether the executive or

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (emphasis in original).

91. Warren D. Zaffuto, Comment, A "Pirate's Victory": President Clinton's Approach to the New FSIA Exception Leaves the Victors Empty-Handed, 74 TUL. L. REV. 685, 695 (1999).

92. *Id.*

the judicial branch should determine immunity.⁹³ In brief, without more concrete legislation, courts could not apply the restrictive theory of foreign sovereign immunity in a clear and uniform manner.⁹⁴

In 1976, Congress enacted FSIA “to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property. . . .”⁹⁵ *Verlinden B.V. v. Central Bank of Nigeria* was one of the first cases to apply FSIA.⁹⁶ The 1983 Supreme Court decision showed that the Court “consistently has deferred to the decisions . . . of the Executive Branch . . . on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.”⁹⁷ As attorney Charlene Caprio explains, however, recent FSIA cases involving art and cultural heritage, e.g., *Altmann v. Republic of Austria*⁹⁸ and *Malewicz v. City of Amsterdam*,⁹⁹ appear to ignore the Supreme Court’s deference to the Executive Branch by acting against the Justice Department’s recommendations for granting immunity according to the FSIA.¹⁰⁰

93. Charlene A. Caprio, *Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act*, 13 INT’L J. CULT. PROP. 285, 287 (2006).

94. Zaffuto, *supra* note 91, at 695.

95. H.R. REP. NO. 94-1487, at 1330 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6623.

96. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983).

97. Caprio, *supra* note 93, at 288 (*quoting Verlinden B.V.*, 46 U.S. at 486).

98. *Altmann v. Republic of Austria*, 377 F.3d 1105 (C.D. Cal. 2004). *Altmann* was the first case to apply the FSIA to a claim of artwork stolen by the Nazis. The works of art in question were six paintings by Gustav Klimt, worth approximately \$150 million, that were stolen by the Nazis and later appeared in the collection of a state-run Austrian Gallery. The court held that the Austrian government acted as a private party and engaged in commercial activities such as advertising exhibitions and publishing books and photos related to the Klimt paintings in question as well as loaning one of the paintings to the United States. Caprio, *supra* note 93, at 291 (finding that “the *Altmann* ruling cast a wide net to deny immunity under the FSIA and set in motion a string of U.S. court decisions that are further chiseling away at foreign sovereign immunity when it comes to state-run museums and educational exchanges of artwork and cultural property.”).

99. Caprio, *supra* note 93, at 292-94 (discussing *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, where the heirs of the artist Kazimir Malewicz claimed ownership of his paintings which had been lent to the Stedelijk Museum in Amsterdam and subsequently exhibited in the United States). While the court found that museum loans were commercial activity, Caprio argues that “the court did not take into account how museum loans are generally perceived in society as noncommercial activities that allow for cultural and educational exchanges.” *Id.* at 293.

100. *Id.* at 288.

The FSIA also included certain cases in which sovereign immunity was subject to exceptions. Section 1610(b) of the FSIA, commonly known as the "commercial use" exception, states:

The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if . . . the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.¹⁰¹

The House of Representatives report on the FSIA¹⁰² gives examples of what constitutes "commercial activity." The exception includes:

[A] broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation.¹⁰³

The Oriental Institute argues that the artifacts of the PFA were used for scholarly research and have not been used for any commercial purpose.¹⁰⁴ Yet books published with information from this research were sold for profit.¹⁰⁵ Iran, however, never participated in the publishing of the books, nor did it receive any profit from their sales.¹⁰⁶ The question therefore, arises as to whether this action constitutes "commercial use"¹⁰⁷ even if it is conducted by a third party, the Oriental Institute, and not by the sovereign state of Iran.

B. Are the Artifacts Commercial Property?

In *Rubin v. Iran*, the plaintiffs' argument that the artifacts constitute commercial property is two-fold. First, the plaintiffs "sought to establish that the commercial use exception

101. 28 U.S.C. § 1610(a)(1), (b)(2) (West 2008).

102. H.R. REP. NO. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

103. *Id.* at 6614.

104. Stein, *supra* note 5, at 5.

105. Wawrzyniak, *supra* note 14, at 25.

106. *Id.* at 27.

107. *Id.* at 24.

encompassed use of property for commercial purposes by any party, not just the foreign sovereign.”¹⁰⁸ Attorney James Wawrzyniak explains that this argument is textual in that:

Comparing the FSIA’s language describing the exception from immunity *from attachment* with the exception from immunity *from suit* revealed that while the latter specifically referenced activity “by the foreign state,” the former did not. From this, the plaintiffs reasoned Congress had made a deliberate choice to allow all commercially used property owned by the foreign sovereign—regardless of who used it—to be attached and executed upon. The plaintiffs also cited dicta in a district court case in Massachusetts that suggested the commercial use exception would indeed apply to property used commercially by a third party.¹⁰⁹

Through this argument, the plaintiffs attempted to interpret the “commercial use” exception to the FSIA as allowing Oriental Institute to be the “third party.”¹¹⁰

In its Second Statement of Interest,¹¹¹ the Justice Department argued against the plaintiffs’ interpretation of the “commercial use” exception to the FSIA. The Justice Department began by returning to Magistrate Judge Ashman’s original finding concerning whether the Oriental Institute constituted a “third party” in the “commercial use” exception to the FSIA.¹¹² The Justice Department established “[t]he Magistrate Judge, applying controlling law, correctly found that under Section 1610(a), it is the use to which the property is put by the foreign sovereign, and not by any U.S. possessor, which controls the application of the exception provisions of the FSIA.”¹¹³ The Justice Department also called attention to the fact that the Magistrate Judge’s opinion was confirmed by the District Court in March 2005.¹¹⁴

The Justice Department justified the Magistrate Judge’s opinion given the considerations that Congress took into account when creating the FSIA. In its Second Statement of Interest, the Justice Department defended:

108. *Id.*

109. *Id.* at 25.

110. *Id.* at 25-26.

111. Rubin v. Islamic Rep. of Iran, 408 F. Supp. 2d 549 (N.D. Ill. 2005), Second Statement of Interest of the U.S. [hereinafter Rubin Statement of Interest of the U.S.].

112. *Id.*

113. *Id.* at 3.

114. *Id.*

[T]he sensitive foreign relations considerations associated with the partial lifting of sovereign immunity embodied in the FSIA were carefully weighed by Congress in circumscribing the limits within which a foreign sovereign's property might be attached, and the baseline presumption that Congress adopted was that foreign sovereign property was to be treated as immune.¹¹⁵

In response, plaintiffs highlighted that Iran had not appeared in court in order to defend its immunity.¹¹⁶ In December 2005, Magistrate Judge Ashman agreed, finding that "sovereign immunity is an affirmative defense that is personal to the sovereign and as to which the sovereign bears the burden."¹¹⁷ The Justice Department considered the Magistrate Judge's finding flawed because "[t]he statutory presumption of sovereign immunity is applicable to the property at issue in these proceedings and plaintiffs should have been required to meet their burden of demonstrating that one of the statutory exemptions to the presumption applies, regardless of the presence of the foreign sovereign in this litigation."¹¹⁸ Furthermore, the Justice Department argued:

[T]he decision of the Magistrate Judge, if it is upheld and applied in later stages of these proceedings, undercuts the purposes intended to be served by the Foreign Sovereign Immunities Act, denies to a foreign sovereign the "grace and comity" to which it is ordinarily entitled, and threatens the foreign policy interests of the United States.¹¹⁹

After Iran entered the proceedings and filed a motion attesting that the artifacts in question were immune from attachment under the FSIA, the Magistrate Judge's decision continued to be maintained and utilized, clearly against the intent of the Justice Department.¹²⁰

The second issue addressed whether publishing and selling books based on scholarly research of the artifacts represents a commercial activity. Using an element of the FSIA that directs courts to determine whether or not the activity is commercial

115. *Id.* at 7 (internal citation omitted).

116. *Id.* at 4.

117. Rubin Statement of Interest of the U.S., *supra* note 111, at 4. *See also Rubin II*, 408 F. Supp. 2d at 555 ("[A]n exemption from attachment must be affirmatively raised, and it is the judgment debtor who bears the burden of proof.").

118. Rubin Statement of Interest of the U.S., *supra* note 111, at 112.

119. *Id.* at 2.

120. *Rubin V*, 2008 WL 192321 at *2.

based on its nature, rather than its purpose,¹²¹ the plaintiffs argued that “[i]f the nature of the use is one that a private (non-sovereign) individual could engage in, it is described as commercial.”¹²² The plaintiffs, therefore, concluded that the publishing and selling of books by scholars at the Oriental Institute was a commercial activity.

Professor Gil Stein, Director of the Oriental Institute, firmly asserts that the tablets do not constitute commercial property.¹²³ He argues that the artifacts of the PFA have “never been . . . bought or sold or used as a source of profit. They’re in a different category from the kinds of things that might be used for compensation.”¹²⁴ Furthermore, said Stein, “[t]he tablets are not commercial assets like oil wells, tankers, or houses. Instead, these types of culturally unique and important materials fall within a special protected category and are not subject to seizure.”¹²⁵ To date, the issue of whether the PFA constitutes commercial property is unresolved. In fact, the latest opinion of the Magistrate Judge reports that “[t]he Court notes that it has been nearly five years since this case began and eighteen months since Iran entered the proceeding, yet the litigation is still at the discovery stage.”¹²⁶

V. INTERNATIONAL AND DOMESTIC LAWS REGARDING CULTURAL PROPERTY

A. *The UNESCO Constitution*

In addition to addressing cultural property in domestic legislation and case law, the United States had been at the forefront of signing, ratifying, and implementing UNESCO conventions calling for international cooperation in the protection and preservation of cultural heritage. In November of 1946, after ratification by twenty countries, including the United States, the constitution of the UNESCO (UNESCO Constitution) came into force.¹²⁷ The Preamble of the UNESCO Constitution explains “[t]hat ignorance of each other’s ways and lives has been a

121. 28 U.S.C. § 1603(d) (West 2008).

122. Wawrzyniak, *supra* note 14, at 25.

123. Stein, *supra* note 5, at 5.

124. Puma, *supra* note 3, at 18.

125. Stein, *supra* note 5, at 5.

126. *Rubin V*, 2008 WL 192321, at *20.

127. *See generally* UNESCO Constitution, *supra* note 10.

common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.”¹²⁸ Additionally, Article 1 of the UNESCO Constitution defends that “[t]he purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights”¹²⁹

Cultural property and comparative law expert John Henry Merryman, in “Cultural Property Internationalism,” interprets Article 1(2)(c) of the UNESCO Constitution as identifying three obligations of states parties vis-à-vis cultural heritage.¹³⁰ These obligations are: (1) conservation and protection; (2) the recommendation of international conventions; and (3) the encouragement of international exchange.¹³¹ Merryman contends that the UNESCO Constitution calls upon states parties to first “protect the object and its context from impairment.”¹³² Next, states parties must allow for “the quest for knowledge, for valid information about the human past, for the historical, scientific, cultural and aesthetic truth that the object and its context can provide.”¹³³ As a final note, Merryman defends that the object must be “optimally accessible to scholars for study and to the public for education and enjoyment.”¹³⁴

128. *Id.* at pmb1.

129. *Id.* art. (I)(1).

130. John H. Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULT. PROP. 11, 21 (2006); UNESCO Constitution, *supra* note 10, at art. 1(2)(C) (“To realize this purpose the Organization will maintain, increase and diffuse knowledge; by assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions; by encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information; by initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.”).

131. Merryman, *supra* note 130, at 21.

132. *Id.*

133. *Id.*

134. *Id.*

B. The Hague Convention

After the massive destruction and transfer of cultural property that occurred in World War II, the international community recognized the need to protect cultural property.¹³⁵ through international treaties.¹³⁶ In 1954, at the Hague, UNESCO adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention).¹³⁷ This treaty was the first international convention to exclusively address cultural heritage.¹³⁸ The United States immediately signed the Hague Convention, but never ratified it.¹³⁹ Patty Gerstenblith explains that the Cold War had a role in the U.S. decision to not ratify the Hague Convention.¹⁴⁰ She asserts that despite the “military necessity exception” present in the Hague Convention, the U.S. government believed that it would not be able to attack the Kremlin because it was a historic monument and would therefore, be protected by the Hague Convention.¹⁴¹ With the end of the Cold War, the U.S. military withdrew its objection to ratification and in 1999, President Clinton handed the Hague Convention to the Senate for ratification.¹⁴²

While the United States still has not ratified the Hague Convention,¹⁴³ scholars like Merryman interpret certain aspects of the Convention, such as the idea of the “cultural heritage of mankind,” to be universal.¹⁴⁴ The Preamble to the Hague Convention reads:

135. For the purposes of this note, the terms “cultural property” and “cultural heritage” will be used interchangeably.

136. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS* 475 (2004).

137. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter *Protection of Cultural Property Convention*].

138. GERSTENBLITH, *supra* note 136, at 475.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* As of September 10, 2007, the United States was not one of the 118 States parties to the Hague Convention. See United Nations Educational, Scientific and Cultural Organization, <http://portal.unesco.org/la/convention.asp?KO=13637&language=E> (last visited Apr. 22, 2009) (listing states that have ratified the Convention for the Protection of Cultural Property in the Event of Armed Conflict).

144. GERSTENBLITH, *supra* note 136, at 475.

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;¹⁴⁵

Merryman asserts that the Hague Convention supports the idea that cultural heritage belongs to everyone in the world.¹⁴⁶

C. *The Cultural Property Convention (1970)*

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property¹⁴⁷ (Cultural Property Convention) and its implementation in the United States define cultural property and designate perimeters for its protection. Accepted by the United States in 1983, the Cultural Property Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories"¹⁴⁸ These categories include archaeological and ethnological materials, as well as inscriptions and engraved seals which are more than one hundred years old.¹⁴⁹ The Cultural Property Convention calls on every state to "respect its own cultural heritage and that of all nations"¹⁵⁰ and stresses that "protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation."¹⁵¹ The Cultural Property Convention maintains that interchange of cultural property among states is necessary because it "enriches the cultural life of all peoples and inspires mutual respect and

145. Protection of Cultural Property Convention, *supra* note 137, pmbl.

146. GERSTENBLITH, *supra* note 136, at 476.

147. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 27 U.S.T. 37, 823 U.N.T.S. 231.

148. *Id.* at art. 1.

149. *Id.* at art. 1, ¶¶ (c)-(f).

150. *Id.* at pmbl.

151. *Id.*

appreciation among nations.”¹⁵² Finally, the Cultural Property Convention recognizes that “cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹⁵³

D. The U.S. Cultural Property Act

In 1983, the United States introduced the Convention on Cultural Property Implementation Act (U.S. Cultural Property Act) to implement the Cultural Property Convention into U.S. law.¹⁵⁴ The U.S. Cultural Property Act accepts the definition of cultural property as outlined in the Cultural Property Convention.¹⁵⁵ The U.S. Cultural Property Act also establishes an advisory committee, composed of experts in archaeology and ethnology as well as three members who represent the general interests of the public.¹⁵⁶ Moreover, U.S. Senate Report No. 97-564 describes the U.S. Cultural Property Act as “promoting U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to nations whence they originate, but also to a greater international understanding of our common heritage.”¹⁵⁷ In addition, a comment by the U.S. Department of State regarding the U.S. Cultural Property Act contends that “[t]he legislation is important to our foreign relations, including our international cultural relations”¹⁵⁸ and also includes the idea of “concern for the preservation of the cultural heritage of mankind.”¹⁵⁹

E. The Protection Convention (1972)

In 1975, President Gerald Ford oversaw the ratification of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (Protection Convention).¹⁶⁰

152. *Id.*

153. *Id.*

154. Convention on Cultural Property, 19 U.S.C. § 2601(5) (West 1983).

155. 19 U.S.C. § 2601(6).

156. Convention on Cultural Property, 19 U.S.C. § 2605 (West 1987).

157. GERSTENBLITH, *supra* note 136, at 557.

158. *Id.* at 558.

159. *Id.*

160. World Heritage Convention, *supra* note 10.

The Preamble to the Protection Convention states that: (1) the "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world"; (2) "the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the people of the world, of safe-guarding this unique and irreplaceable property, to whatever people it may belong"; and (3) "parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."¹⁶¹ Furthermore, Article 4 of the Protection Convention requires each state party to protect and safeguard items of cultural heritage located within its borders.¹⁶² Moreover, Article 5(d) calls for each state party to undertake policies and legislation in order to protect cultural heritage.¹⁶³ Finally, Article 7 emphasizes the need for international cooperation in order to protect world cultural heritage.¹⁶⁴ Gerstenblith indicates that this concept of the universality of cultural heritage is present in the 1972 UNESCO Convention and in its implementing legislation by the U.S. Senate.¹⁶⁵

The United States clearly has public policy concerns for the protection of cultural heritage, as evidenced by its actions in signing and ratifying the UNESCO Convention.¹⁶⁶ The United States has not made reservations¹⁶⁷ to the Convention's articles

161. *Id.* at pmb1.

162. *Id.* at art. 4 ("Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.").

163. *Id.* at art. 5(d) ("to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage").

164. *Id.* at art. 7 ("For the purposes of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.").

165. GERSTENBLITH, *supra* note 136, at 557.

166. *Id.* at 556-57.

167. Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 (defining "reservation" as "a unilateral statement . . . made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to

requiring international cooperation for the protection and/or preservation of cultural property.¹⁶⁸ Regarding *Rubin v. Iran*, Charlene Caprio asserts that “[t]he United States’ tradition of respecting cultural heritage ownership rights of source countries and native cultures has not been considered.”¹⁶⁹

VI. THE CULTURAL PROPERTY OF THE IRANIAN PEOPLE

A. Article 83 of the Iranian Constitution

From this discussion of what constitutes cultural heritage, the question arises as to whether the artifacts belong to the Iranian state or the Iranian people. Additional questions arise when examining Article 83 of the Iranian Constitution, which states: “Government buildings and properties forming part of national heritage cannot be transferred except with the approval of the Islamic Consultative Assembly; that, too, is not applicable in the case of irreplaceable treasures.”¹⁷⁰ Caprio interprets Article 83 to mean that “pieces considered irreplaceable treasures to the country are never transferable.”¹⁷¹ If Iran does not hold transferability over the artifacts, Caprio concludes that “[a]n attachment thus would only result in an unlawful taking.”¹⁷²

New York-based attorney James S. Irani drafted a petition to the Court opposing the seizure of the PFA tablets. In his petition, Irani argues that the tablets “do not belong to any specific government or administration.”¹⁷³ He further argues that “[t]hese tablets do not belong to the Iranian government but to the world as well.”¹⁷⁴ Irani’s petition also demonstrated the interest of the

exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

168. Declarations and Reservations to the Convention Concerning the Protection of the World Cultural and Natural Heritage, available at http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (last visited Apr. 22, 2009).

169. Caprio, *supra* note 93, at 287.

170. Qanuni Assassi Jumhuri’I Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 83, available at http://www.iranchamber.com/government/laws/constitution_ch06.php.

171. Caprio, *supra* note 93, at 299.

172. *Id.*

173. James S. Irani, *Petition to US Federal Court in Chicago Opposing Seizure of Ancient Persian Tablets*, PAYVAND, Aug. 3, 2006, <http://www.payvand.com/news/06/aug/1032.html>.

174. *Id.*

Iranian-American community, as it included 1,200 signatures at the time of its submission on August 3, 2006.¹⁷⁵

More recently, Trita Parsi, President of the National Iranian American Council (NIAC), stated that "[t]he Iranian-American community has felt helpless in face of this threat to their historic heritage."¹⁷⁶ As such, NIAC requested and received pro bono representation from Mayer Brown, LLP in March 2008. With the help of the law firm, Parsi hopes to "creat[e] an avenue for the community to have their concerns and interests considered in this legal battle."¹⁷⁷ Representatives of the NIAC assert that the artifacts do not belong to the Iranian government or state, but to the people of Iran.¹⁷⁸ Djamshid Foroughi, a member of NIAC's Board of Directors, explained that "[t]hese are priceless artifacts and belong to the people and descendants of the Achaemenid Empire. As Iranian Americans, we simply cannot allow our heritage to be auctioned off."¹⁷⁹ Abbas Alizadeh, Senior Research Associate of the Iran Prehistoric Project at the Oriental Institute, reasons that:

These tablets belong to a [whole] nation. And any government in power at any given time—now, in the future, or in the past—is merely the custodian of these tablets, not the owner.... Therefore you cannot seize them from the Iranian government—or you would have to take the people of Iran to court, which is impossible.¹⁸⁰

Similar to Article 83 of the Iranian Constitution, the statements of the Iranian community and Alizadeh explain not only the significance of the artifacts in question, but also the unlawfulness of using them to satisfy a judgment against Iran.

175. James S. Irani, *Rubin v. Islamic Republic of Iran* (03c9370): *Default Judgment Against a Nation*, PAYVAND, Aug. 2, 2006, <http://www.payvand.com/news/07/aug/1019.html>.

176. Shadee Malaklous, *NIAC Enlists Major Law Firm to Protect Persian Tablets*, NAT'L IRANIAN AM. COUNCIL, Mar. 12, 2008, http://www.niacouncil.org/index.php?option=com_content&task=view&id=1060&Itemid=2.

177. *Id.*

178. *Id.*

179. *Id.*

180. Golnaz Esfandiari, *Iran: Tehran, U.S. Academics Challenge Seizure of Persian Tablets*, RADIO FREE EUR./RADIO LIBERTY, July 12, 2006, <http://www.rferl.org/content/Article/1051040.html>.

VII. OTHER WAYS OF COLLECTING FROM IRAN

It is important to note that there are other methods of collecting from Iran that do not involve cultural property. In the 2005 Congressional Research Service Report entitled “Suits Against Terrorist States by Victims of Terrorism,” Jennifer Elsea explains the history of the FSIA as relevant for victims of state-sponsored terrorism to receive compensation.¹⁸¹ The defendants in the FSIA lawsuits are terrorist states, like Iran, who refuse to appear in U.S. courts.¹⁸² As such, large default settlements have been awarded to the plaintiffs, who are victims of state-sponsored terrorism.¹⁸³ In these suits, however, problems arose in collecting on the awards due to the tension between the Executive Branch and U.S. Congress.¹⁸⁴ The Clinton and George W. Bush administrations attempted to block assets from terrorist states, including diplomatic or consular property. As a result, plaintiffs could not collect on their judgments.¹⁸⁵

The Bush administration’s rationale has several components. First, it found that the United States must adhere to its international treaty obligations to safeguard the diplomatic and consular properties of other states.¹⁸⁶ If it did not, the administration contended that the United States would lose its ability “to conduct diplomatic and consular relations and protect personnel and facilities.”¹⁸⁷ In addition, blocked goods could be valuable instruments of diplomatic leverage in the future.¹⁸⁸ The administration gave examples of the use of blocked assets as a leverage tool, “such as was used to gain the release of our citizens held hostage in Iran in 1981 or in gaining information about POWs and MIAs as part of the normalization process with Vietnam.”¹⁸⁹ Additionally, the administration explained that the ability to block assets was an essential component to combat the “War on

181. Jennifer K. Elsea, *Suits Against States by Victims of Terrorism*, LIBRARY OF CONGRESS: CRS REPORT (July 31, 2008), <http://www.fas.org/sgp/crs/terror/RL31258.pdf>.

182. *Id.* at 2.

183. *Id.*

184. *Id.*

185. *See generally id.* Though both administrations objected to making available frozen assets of terrorist states to satisfy judgments, President Bush signed the Terrorism Risk Insurance Act (TRIA) in 2002. Section 201 of TRIA overrode those objections. *Id.*

186. *Id.* at 13.

187. *Id.* at 14.

188. *Id.* at 9.

189. *Id.* at 13.

Terror.”¹⁹⁰ Furthermore, if preliminary claimants were to seek attachment of blocked assets, there might not be any remaining assets to compensate later victims.¹⁹¹ The administration found that this would lead to a “race to the courthouse” as holders of judgments would have to compete for a limited amount of funds that could be depleted.¹⁹² Finally, the administration reiterated its fear that U.S. assets would be subject to reciprocal action abroad.¹⁹³

A. *The Justice for Victims of Terrorism Act of 2000*

In spite of the administration’s criticisms, Congress has tried to enact measures to make payment to victims possible.¹⁹⁴ One such act proposed by Congress was the Justice for Victims of Terrorism Act of 2000. The Clinton administration opposed this Act because it “would have amended the FSIA to allow the attachment of all of the assets of a terrorist state, including its blocked assets, its diplomatic and consular properties, and moneys due from or payable by the United States.”¹⁹⁵ More specifically, the Act would not have given the President the authority to “waive the requirements of this section in the interest of national security.”¹⁹⁶ The Justice for Victims of Terrorism Act was not made into law despite numerous protests accusing the President of choosing “to protect terrorist assets over the rights of American citizens seeking justice.”¹⁹⁷

B. *The Victims of Trafficking and Violence Protection Act of 2000*

Discussions led by interested members of Congress with the Clinton administration resulted in the enactment of an alternative piece of legislation: Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).¹⁹⁸ The VTVPA created a limited alternative compensation system for U.S. victims of terrorism.¹⁹⁹ While unrelated to the Justice for Victims of

190. *Id.*

191. *Id.* at 14.

192. *Id.*

193. *Id.*

194. *See id.*

195. *Id.* at 12.

196. *Id.* at 10.

197. *Id.* at 13.

198. *Id.* at 15.

199. *Id.*

Terrorism Act of 2000, the VTVPA “directed the Secretary of the Treasury to pay portions of any judgments against Cuba and Iran that had been handed down by July 20, 2002, or that would be handed down in any suits that had been filed on one of five named dates on or before July 27, 2000.”²⁰⁰ The judgments against Cuba would be paid out of frozen Cuban assets and the compensatory damages of judgments against Iran would be paid by the United States, which would then be required to seek reimbursement of those payments from Iran.²⁰¹

While the VTVPA is certainly a step in the right direction to compensate victims of terrorism, it is limited in application and has been appropriately criticized. The VTVPA only provides compensation to victims of Iranian-financed terrorism in ten pre-designated lawsuits.²⁰² There is no clear indication that the Act will allow for future compensation claims, nor does the Act state that it will provide relief to those who have already received judgments against Iran but were not included in the original ten cases. Furthermore, critics of the Act have argued that using U.S. funds to compensate victims of terror contradicts one of the main reasons for the terrorist state exception to FSIA—that terrorist states should be forced to pay for their actions in order to deter them from future terrorist acts.²⁰³

C. The Compensation Act of 2002

In its 107th session in 2002, Congress asked the administration to include in its budget, a program that would ensure compensation for U.S. victims of terrorism.²⁰⁴ When the administration took no action on its request, “Congress added more suits to those listed as compensable under § 2002 and sought to make more frozen assets available to satisfy judgments.”²⁰⁵ On April 16, 2002, Senator Tom Harkin introduced a bill entitled, “The Terrorism Victim’s Access to Compensation Act of 2002” (Compensation Act), which would “allow American victims of state sponsored terrorism to receive compensation from blocked

200. *Id.*

201. Elsea, *Lawsuits Against State Supporters*, *supra* note 19, at 3.

202. *Id.* at 4.

203. *Id.*

204. *Id.*

205. *Id.*

assets of those states.”²⁰⁶ Harkin and the nine other senators that supported the introduction of the bill²⁰⁷ found that “[t]he Secretary of the Treasury lawfully controls billions of dollars in blocked assets of several governments which the President and the Department of State have determined to be state sponsors of international terrorism and responsible for multiple terrorist attacks on United States citizens abroad.”²⁰⁸ They proposed that the United States should adopt a policy “to use the blocked assets of state sponsors of acts of terrorism (including their agencies and instrumentalities) that are under the control of the Secretary of the Treasury to pay court-ordered judgments and awards made to United States nationals harmed by such acts.”²⁰⁹ The senators further insisted that the bill “provide equal access to all United States victims of state sponsored terrorism who have secured judgments and awards in Federal courts against state sponsors of terrorism.”²¹⁰ Additionally, the sponsoring senators found that the bill would serve as a deterrent for terrorist-supporting states.²¹¹

The Compensation Act also includes a “presidential waiver,” allowing the President, on a case-by-case basis, to choose not to allow a judgment to be satisfied using certain blocked assets, if it would not serve the interest of national security.²¹² There is, however, an exception to the presidential waiver, which reads: “A waiver under this subsection shall not apply to (A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used for

206. Terrorism Victim’s Access to Compensation Act of 2002, S. 2134, 107th Cong. (2002) [hereinafter *Terrorism Victim’s Act*].

207. *See id.* (The senators sponsoring the Terrorism Victim’s Access to Compensation Act of 2002 were: Tom Harkin (IA), George Allen (VA), Robert C. Smith (NH), Charles E. Schumer (NY), Donald Nickles (OK), Hillary Rodham Clinton (NY), John Warner (VA), Barbara Mikulski (MD), Conrad Burns (MT), and Larry Craig (ID)).

208. *Id.* § 2(3).

209. *Id.* § 3(1).

210. *Id.* § 3(2).

211. *See id.* § 2(5) (“Paying victims of state sponsored terrorism from the blocked assets of state sponsors of acts of terrorism (including their agencies and instrumentalities) will punish those entities, deter future acts of terrorism, and provide a powerful incentive for any foreign government to stop sponsoring terrorist attacks on Americans.”).

212. *Id.* § 4(b)(1) (“Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment or satisfaction in aid of execution of judgment, or execution of judgment, against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.”).

any nondiplomatic purpose (including use as rental property), and the proceeds of such use.”²¹³

In June 2002, Senators Harkin and Allen developed an amendment (Amendment) to the Compensation Act in order to specify that “compensation [would] be paid first and foremost from the blocked and frozen assets of the state sponsors of terrorism and their agents, not U.S. taxpayers.”²¹⁴ The Senators explained that there are numerous American victims who have won verdicts and judgments in U.S. federal courts, but have been unable to collect on their judgments. They attested that “[o]ur own government has worked to prevent these families from collecting.”²¹⁵ The Senators contended that “[t]he Harkin-Allen Amendment sends a clear message to foreign governments that sponsor international terrorism: If you sponsor terrorism, if you attack innocent Americans, we will pursue you, we will bring you to justice, and America will literally make you pay.”²¹⁶

In response to the Compensation Act and the Amendment, the Congressional Budget Office (CBO) drafted an estimate of the cost to the federal government of implementation of the Act. The CBO estimated that the cost in 2003 of enacting the Compensation Act would be \$22 million, and in 2004 the cost would be an additional \$29 million.²¹⁷ It also accurately reported that “S. 2134 would increase the number of plaintiffs eligible to receive payments under the Victims Protection Act.”²¹⁸ Regarding Iranian assets in the United States, the CBO referred to the Department of the Treasury’s Office of Foreign Assets Control (OFAC), which found that “the blocked assets of Iran are primarily properties associated with their former diplomatic mission to the United States”²¹⁹ and are valued at \$23 million.²²⁰ The CBO went on to note that, because this property has been used for non-diplomatic purposes since the suspension of diplomatic relations with Iran, it

213. *Id.* § 4(b)(2)(A).

214. Harkin-Allen Amendment on Terrorism Victim’s Access to Compensation, S. 5568, 107th Cong. (2002) (amending S. 2134), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_record&page=S5568&position=all [hereinafter Harkin-Allen Amendment].

215. *Id.* at S5569.

216. *Id.*

217. Terrorism Victim’s Act, *supra* note 206.

218. *Id.*

219. *Id.*

220. *Id.*

would be subject to the exception to the presidential waiver in the Compensation Act.²²¹

D. The Lautenberg/Specter Bill

The idea of compensation for victims of terrorism lay dormant in Congress until January 28, 2008. On that date, President Bush signed into law the final version of the "2008 Department of Defense Authorization Bill," which included a measure that allows victims of state-sponsored terrorism "to seize hidden commercial assets for compensation if they win judgments in court."²²² Senators Frank Lautenberg and Arlen Specter spearheaded passage of the Bill in their attempt to provide justice to U.S. victims of terrorism. Based on the Justice for Victims of State Sponsored Terrorism Act, the Lautenberg/Specter Bill provided the plaintiffs in *Rubin v. Iran* alternative methods of compensation.²²³

VIII. IMPLICATIONS OF THE LAWSUIT

If the plaintiffs are ultimately successful in *Rubin v. Iran*, there are numerous implications for the academic and museum communities. First, Caprio notes that there is no guarantee that a possible buyer for the artifacts will keep the collection together and/or allow for continued access by scholars and researchers.²²⁴ For example, she asserts that, "[a]lthough it is likely that the bombing victims would sell the tablets for money, a buyer is not prechosen or prescreened and in the event of an auction, a wealthy private bidder may very well outbid a museum or educational institution."²²⁵ Secondly, Caprio demonstrates that "[t]he Persian collections, if attached, may permanently be removed from the research and educational communities or be altered, mismanaged, inadvertently defaced or destroyed if private owners seek to display or store the artifacts in ways that compromise their preservation."²²⁶ By selling the artifacts at an auction, the artifacts would be scattered among private owners, and future scholars

221. *Id.*

222. Lautenberg/Specter Bill, *supra* note 11.

223. *Id.*

224. Caprio, *supra* note 93, at 298.

225. *Id.*

226. *Id.*

would not be able to study the PFA as a collection.²²⁷ Moreover, as their importance lies in how they fit together, Caprio argues, “[d]ividing the collections up among the victims of the bombings can cause the collection to become permanently severed, with important historical and cultural information forever lost.”²²⁸

Professor Gil Stein also asserts “the [lawsuit’s] stakes are enormous. If the lawsuit prevails, this would do irrevocable harm to scholarly cooperation and cultural exchanges throughout the world.”²²⁹ In addition, Professor Alicia Hilton claims that “[f]oreign nations might also cease to lend art treasures to American museums for study or temporary exhibits out of fear that aggressive plaintiffs might seize the opportunity to execute unsatisfied judgments.”²³⁰ Accordingly, Alizadeh suggests that “all of the world’s museums would be in danger.”²³¹

On the other hand, Strachman argues that, “[w]hether [the artifacts] fetch . . . \$100 or \$100,000 or \$100 million, whatever funds are raised should be sued [sic] to compensate the victims.”²³² The question in this lawsuit is not whether the victims in *Rubin v. Iran* are owed compensation, but rather, how these victims should be compensated. As Senators Harkin and Allen explain in their amendment to the Compensation Act:

American victims of state-sponsored terrorism deserve to be compensated for their pain, suffering, and losses by those terrorists who sponsor and commit these terrible acts. The Congress should clear the way for those with court-ordered judgments to be paid from blocked terrorist assets and, in so doing, deter future acts of state-sponsored terrorism against innocent Americans.²³³

Additionally, Strachman contends that “if the University [of Chicago] wants to buy the antiquities, they’re free to do so. So would any other institution. And if they want to convince their partners, Iran, to simply pay the judgment, they’re free to do that as well.”²³⁴ Simply purchasing the antiquities, as Strachman suggests, would leave the door open for future lawsuits by victims

227. See Hilton, *supra* note 18.

228. Caprio, *supra* note 93, at 298-99.

229. Stein, *supra* note 5, at 5.

230. Hilton, *supra* note 18.

231. Esfandiari, *supra* note 180.

232. Fight Over Ancient Persian Tablets Goes to U.S. Court, *supra* note 73.

233. Harkin-Allen Amendment, *supra* note 214.

234. Fight Over Ancient Persian Tablets Goes to U.S. Court, *supra* note 73.

of state-sponsored terrorism to try to execute upon other antiquities in research collections throughout the United States. Changes in legislation, therefore, are necessary in order to ensure that cultural property does not continue to be sought as a means of satisfying a legal judgment against a sovereign.

IX. CONCLUSION

Rubin v. Iran presents myriad issues for the legal, archaeological, and museum communities, as well as for the Iranian community. A ruling in favor of the plaintiffs may significantly alter how archaeological research is conducted in the United States, as well as cause irrevocable harm to both the artifacts in question and the relationship between the United States and Iran, which is already unstable at best. The United States has a duty under the UNESCO Conventions, which it ratified in 1946, to cooperate with other nations in order to protect and preserve cultural property as "a finite, depletable and nonrenewable resource."²³⁵ In addition, the United States has a duty to follow Congress' original intent in drafting the FSIA. That is, the foreign policy interests of the United States should not be threatened.

On the other hand, a decision in favor of the defendants may push the administration to respond to Congress' attempts to provide alternatives to lawsuits, such as the recent Lautenberg/Specter Bill. Moreover, such a decision may lead to the creation of legislation that clearly defines cultural property and protects it from being used to satisfy a U.S. court judgment against a foreign sovereign.

Not only is it unlawful to use cultural property to satisfy a legal judgment against a foreign sovereign, but protecting cultural property has a moral component as well. Gerstenblith argues that "[c]ultural property is that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property."²³⁶ Based on the findings of Oriental Institute researchers,²³⁷ one can conclude that the PFA has indeed improved our understanding of the ancient Persian culture. Moreover, as Cuno explains, "[c]ultural property is

235. GERSTENBLITH, *supra* note 136, at 642.

236. *Id.* at 569.

237. Parisi, *supra* note 28.

presumed to have a special meaning to the powers that claim it (also to the people governed by those powers). It is said to derive from them and to be a part of them. It is central to their identity. And they are attached to it emotionally.”²³⁸ The interest and involvement of the Iranian American community in *Rubin v. Iran* clearly demonstrates the importance of the PFA to their cultural heritage, which the United States has a responsibility to protect and preserve under international law.

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238. JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 9 (2008).

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